No. 78.

Court of Private Land Claims.

Supreme Court of the United States.

October Term, 1898.

J. B. CESSNA, J. B. KEEDLE, et al.,

v.

THE UNITED STATES et al.

No. 75.

Appeal from the Court of Private Land Claims.

ARGUMENT FOR APPELLANTS.

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Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

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Appeal from the Court of Private Land Claims.

ARGUMENT FOR APPELLANTS.

This is an appeal from the decision of the United States Court of Private Land Claims dismissing the petition.

Some time in the year 1822 a Roman Catholic gentleman, an Anglo-American, and a former citizen of the State of Missouri, by the name of John G. Heath, whose Spanish name was Juan Gid, visited the province of New Mexico and settled in the neighborhood of El Paso.

Heath had resided before this in Saline county, Missouri, and was spoken of by his neighbors as being the wealthiest man in that county (Rec., fol. 190–1). Chas. E. Wood describes him as a very shrewd and intelligent man; scarcely had an equal, if any, in the State; was a leader of men all his life. He was a lawyer and a judge of the court for many years; was an eloquent speaker; * * * had considerable magnetic power and influence over men (Rec., fol. 194).

James Bryan relates of him that he was a very prominent, influential and wealthy man. He was a member of the first constitutional convention in Missouri, in 1820; was often talked of as a candidate for governor of the State, but would not take the position. Heath was wealthy; owned a great deal of land in different counties of the State and a number of slaves (Rec., fol. 189).

While residing at El Paso he made application by petition to Iturbide, who was then the Constitutional Emperor of Mexico, and so admitted and recognized by the province of New Mexico, to grant to *him*, and for himself, land of the Bracito sufficient to settle thirty families of Catholic Christians, and among them mechanics, architects, and doctors, and to establish a hospital and to store it, and also to introduce the necessary machines for the manufacture of woolen and cotton cloths, and for the manufacture of gunpowder, which was, when made, to be sold to the government at a concession (Rec. 149, fol. 231).

The land described was to be upon both sides—that is to say, upon both banks of the Bracito and embraced 130,000 acres.

Heath probably fixed the number of his families at thirty, in accordance with the Spanish law, which fixed that number for colonists as contradistinguished from empresario contracts.

The first petition of Heath was made on the 27th of December, 1822, directly to the Emperor, and was forwarded by the Ayuntamiento to His Imperial Majesty. This petition was made prior to the Colonization Act of January 3, 1823. At that time the Crown lands of the Empire were both under the Spanish law, and a special decree of the Mexican Congress vested in the Emperor, and he had power, under what might be called the common law of Mexico, which was inherited from the common law of Spain, to make such grants in such quantities and upon such conditions as he pleased, without the interposition of any Cortes or other legislative body.

Heath was a neighbor from 1819 to 1821 of Moses Austin. Moses Austin about this time (1819) had made an application to the Spanish government, through the governor of Texas, for a large tract of land in Texas, well known in litigation and in history as the "Austin Land Grant" and "Austin's Colony." This was an empresario's grant and gave permission to Austin to introduce three hundred families in Texas. This application was successful, but before Austin could avail himself of it he died. His son, S. F. Austin, took up the enterprise, but a successful revolution in Mexico against the Spanish Crown compelled Austin to make application to Iturbide for a grant of the land. He journeyed to the City of Mexico for this purpose, and arrived at the capital on the 29th of April, 1822, and found the form of government, as then established, to be a limited monarchy, in conformity with the plan of Iguala and the treaty of Cordova. While there, on the 18th of May, 1822, Iturbide was proclaimed Emperor, and on the 19th, the following day, he was declared by a majority of the legislative body to be Emperor of Mexico.

Subsequently, on the 21st of July, he was, by an order of the same Congress, crowned Emperor, and about a month afterwards the crown was made heritable in his family.

The Emperor, with the petition of Austin before him for the settlement of three hundred families in Texas, which was to be under the empresario Austin's control, and the petitions from other individuals as colonists, invited his council to frame a general colonization law to be passed by the Junta, that all that should apply should be placed on the same footing. The committee on colonization proposed a general colonization law; the discussion of which had proceeded, in detail, to within three articles of the end, when, on the 31st of October, the Congress was turned out of doors by an armed force acting under a decree of the Emperor, for the same reasons given by Cromwell, in 1643, for dissolving in like manner the Long Parliament of Great Britain. Iturbide, like Cromwell, declared that Congress was dissolved and vested the legislative power of the nation in a Junta Instituyente. The new Junta took up the remaining three articles at the end of the general colonization law and the whole Act was finally passed and was approved by the Emperor, and promulgated on the 4th of January, 1823.

At the time of the passage of this Act, the title of the public lands was vested in the Emperor, and he could, without the formation or passage of a general colonization law, make a grant of the lands for the public good; but if he chose to have the *Junta Instituyente* prescribe the conditions under which the land should be granted to empresarios and colonists, he had a legal right to do so, and whether the *Junta* was a constitutional body or not, he could lawfully use them as a council of advisers to promulgate such general rules of conduct to his subjects as he would pursue in the disposition of the public lands. His royal edict approving and his promulgation of the general colonization law on the 4th of January, 1823, was legal and binding, and a grant of public lands under it would be valid against the government or its subjects. Austin, under this law, obtained an empresario's contract to settle his lands in Texas. This grant was made to him on the 18th of February, 1823, and was issued to him by the Emperor's final decree on this subject, on the 23d of February, 1823. News reached the City of Mexico that on the 2d of December, 1822, Santa Anna, who had received his commission as general from the Emperor, and who at the time wore upon his breast the placque of the Imperial Order of Guadaloupe bestowed upon him by the Emperor, and who was commander under the Emperor at Vera Cruz, had raised the standard of rebellion.

Soon after the arrival of this news and after Iturbide had taken the field, Iturbide summoned the original Congress which he had dissolved, and a treaty was made that neither were to have any troops in the City of Mexico until a full Congress met. On the 29th of March, Congress met and it was resolved by it that the executive power of Mexico, which means the Empire which had existed since the 19th of May, 1822, up to that time, had ceased, and on the 31st of said month a decree was made that the executive authority of the Mexican nation (not Empire) should be originally deposited in a body who should be styled "*The Supreme Executive Power*," and should be composed of three individuals, etc. On the 8th of April, 1823, Congress resolved that the coronation of Iturbide was an act of violence and force, and was null.

We have seen that in the month of December, 1822, and while Iturbide was obeyed by the Cortes and all the provinces of Mexico, and recognized by these independent States as their Imperial Magistrate, John G. Heath petitioned His Imperial Majesty to designate to him the land in question, generally described, particularly located and yet unsurveyed (Rec. 149). His Majesty gave no answer to this petition, but retained it, and as a consequence of such petition along with others caused the laws of colonization under the date of January 4, 1823, to be promulgated. In consequence of this Heath applied *de novo* to the Ayuntamiento to grant him this land, and under which Act the officials at El Paso and Heath supposed the Ayuntamiento, under and by virtue of the authority of the Colonization Act of January 3, 1823, had power to grant lands to colonists out of the adjacent public land within their jurisdiction but not within the town grant, if any such existed.

Exhibit A of the *expediente* which we claim gave to Heath his title (Rec. 168, fol. 259) is dated April 3, 1823.

COUNCIL HALLS OF EL PASO DEL NORTE, *April 3d*, 1823.

The record and expediente recite that "on this day, April 3, 1823, "Don Juan Gid, doctor of medicine, of the Anglo-American nation, "from the State of Missouri, appeared requesting to know the result "of the petition which he made the former Ayuntamiento on the "27th day of December of last year through the Secretary of State to "His Imperial Majesty, and he is answered that no *immediate* reply "has been received, but that the government of the province, "through Viscaria, political and military chief (of the Emperor), in "an official communication of the 2nd of March, sent the decree of "the 3d of January of this year commanding it to be published

" and obeyed; which decree was issued by the national *junta* " *instituyente* and sanctioned by His Imperial Majesty, the thirty- " two articles of which treat of colonization matters. These (the " laws) were read to the said Don Juan Gid, and being made ac- " quainted with them he to-day made a new petition asking that " by virtue of the law and its privileges he may be given an " 'hacienda' in the same land that he had already asked for, offering " to perform everything he promises in said petition for the good " of this town and the Mexican nation."

This record further recites that "the corporation, having in mind " the said Colonization Act and the said proposals, which it con- " sidered beneficial and useful to this town, after consulting the " private individuals, resolved to provide the following in the matter " of the petition:

"That, saving the superior determination of the government by " which this shall be given, his proposals and petition are admitted, " and when he presents himself the land he asks for shall be assigned " to him in these terms: 'The head of the Bracito shall be the " central point of the square of said "hacienda"'—that is to say, two " and one-half leagues in a straight line up the river and two and one- " half leagues down the river, the same being in the side that forms " the square.

"2nd. Unimportant.

"3d. That this minute (of the board) and the petition of Don Juan " be made known to the puplic in order that if it should happen that " any Mexican citizen of the jurisdiction offers the same proposition " for the benefit of the public, etc., he may be permitted in preference " to every foreigner, for which purpose the term of three days is " given.

"4th. That Don Juan Gid having ownership of the land, etc., all " arrangements shall be made with him by any of the inhabitants of " this jurisdiction, etc., for the settlement of that place.

"5th. Unimportant.

"6th. Provides for the survey of the boundaries.

"In conclusion, for which purpose this shall be given, together " with this minute, and an authenticated copy of it shall also be made " for the protection and information of the party in interest; this " original to remain in the archives, together with the petition of Don " Juan, as a perpetual testament. Thus it was resolved by the alder- " men, together with the two alcaldes, signed before me, the secretary " of the corporation, to which I certify.

"To this Exhibit A is appended a copy of the original to be found

" in the books of entries of the minutes of this illustrious corporation,
" which remain in the archives under my charge, to which I certify
(Signed) " JUAN MARIA PONCE DE LEON,
"*Secretary.*"

This transaction was all completed on the 3d of April, 1823. Some time after the 24th of April, 1823, a letter was written by Rascon, one of the alcaldes, and Ponce de Leon, secretary of the Ayuntamiento, transmitting the petition and proceedings to the government. How long after the 24th of April, 1823, there is no means of judging. (Rec. 170, fol. 262.)

See petition and the proceedings of the Ayuntamiento. (Rec. 157, fol. 243.)

It is admitted that the United States troops, during the war with Mexico, in the year 1846, when they took possession of the town of El Paso, destroyed a large portion of the public archives of El Paso, where the originals of all grants were required to be deposited. (Rec. 175, fol. 269.)

On the 11th of April, 1823, Congress passed a decree authorizing the executive to confirm the grant to Austin, and also, in a *foot-note* to the day's proceedings an intention to declare the suspension for the future (but made no order for the publication of this matter) the law of colonization passed by the *junta instituyente* on the 3d of January, and sanctioned and published on the 4th of January, 1823, until a new resolution of Congress was passed on the subject. There is no evidence that the intention to suspend was ever approved by the Supreme Executive Power or that it was ever published.

On the 17th of April, 1823, the lands were surveyed and the livery of seisin made to Heath and the record filed in the archives of the Pueblo of El Paso. (Rec. 167, fol. 258.)

After all this was accomplished, and Heath had made his payment of the customary fees, without any notice to him, that appears of record, that there was any dissatisfaction or difficulty with his grant, he left New Mexico and returned to the State of Missouri. The evidence is uncontradicted, full and complete that Heath at the expense of some $75,000 (Rec. 111, fol. 174; Rec 116, fol. 183; Rec. 115, fol. 181; Rec. 120, fol. 189) took thirty families or more, composed of over two hundred men, women, and children, together with all the stores, wares, machinery, drugs, and a printing press, that were required of him in the performance of his promise to cultivate and settle the land granted him, and to develop the arts and

manufactories, and returned to El Paso and went upon his land and cultivated it. (Rec. 183, fol. 207 ; Rec. 129–202.)

Gregoria Herrera (Rec., 132, fol. 206) says : " I was born in Paso del Norte, and at present I reside at Juarez, Mexico. In 1823 and 1824 I was living at El Paso. I knew Juan Gid in 1822–23–24 ; saw him frequently at El Paso. I met him in 1824, in El Brazito, a land which had been granted to him on the part of the Mexican government through the intervention of the Ayuntamiento of Paso del Norte in 1823, on or near the place where to-day Las Cruces, New Mexico, is situated. At that time I passed there in company with my father, my uncle and various brothers, all of which have died. I found Gid when I was eleven years old. I remember that a dog jumped at us and frightened the mule my uncle was riding and he was thrown. * * * He left his lands on account of the fall of Iturbide. Heath could not remain on his lands because they did not let him. I know that it was generally known that the Ayuntamiento of El Paso had granted said lands to Heath, whom I saw at one time on said lands. He was generally reputed at the time in that country as the owner of the ' sitio ' of the lands * * * and it was also well known that Heath, with his family, and others which depended on him, were living on said lands some time in 1824. * * * Heath having been an American foreigner, and having obtained the grant under the laws of Iturbide, he was not allowed to occupy the lands of the grant, neither was he permitted to stay and live on them, for which reason he left and returned to the United States."

Price Cooper also says (Rec. 129, fol. 202) : " I know that a tract of land was granted to Heath in 1823 through the town council of El Paso. Got my information from Heath, the town council, and others, and have often been on the land. It is known as the Bracito, situated on the Rio Grande river, about forty miles west of El Paso. Heath was just in possession of this land ; then went to the United States to get some people to help him cultivate the same. He returned in 1824 with his family and 200 persons with him. They remained a short time on this land, and then, after the overthrow and death of Iturbide, they were driven off and returned to the United States. I met Heath and others on this land. He had brought many things with him—stores, provisions, machinery of all kinds, farm implements, plows, etc. (Rec., fols. 201–2.) Ponze de Leon, Marenio Baroelli, and other Mexican officers told me that he was driven away and not allowed to cultivate or remain on his land because the grant had been made to him under the laws and reign of Iturbide." He further says :

"I met Heath first in 1822 or 1823, at El Paso del Norte, *and on his land*, the Brayito. When he returned in 1824 he had his wife, family—four children, boys and girls, and some two hundred persons with him. Brought with him a great many things—farm implements, machinery of all kinds, stores, provisions, and printing press. When he was driven off he had to leave all his things behind him, not having the money to take them back. At the time he left he said it had cost him many thousand dollars to get here, and it would ruin and bankrupt him to go back. Many things that Heath brought were taken from him by the Mexican people and the Mexican government. I afterwards saw some of his machinery in Chihuahua. Heath was forced to leave his land under the threat of imprisonment or death." (Rec. 130, fol. 202, 203.)

This testimony is amply corroborated by a cloud of witnesses. The testimony is complete, that Heath was banished under penalty of death from his settlement and from the country, and as a consequence returned to his own country ruined and bankrupt, having lost over $75,000 in the adventure. After his banishment Mexico was in a continuous state of turbulency and revolution, over three hundred revolutions having taken place in less than thirty years. Appleton Ency., Tit. Mexico. With the state of public feeling in Mexico after the execution of Iturbide, it would have been idle for Heath to have attempted to obtain a confirmation of his rights from the government of Mexico, nor could he with safety have submitted his cause to her judicial forums. Earlier than 1836 the United States was forced to demand redress from one of this ephemeral and transitory revolutionary governments of Mexico. Mr. Buchanan, as chairman of the Committee on Foreign Relations in 1837, presented the following report to Congress:

"The Committee on Foreign Relations, to whom was referred the message of the President of the 6th inst., with the accompanying documents on the subject of our present relations with Mexico, report:

"From the documents submitted to the committee it appears that ever since the revolution of 1822, which separated Mexico from Spain, and even some years before, the United States had repeated causes of just complaint against the Mexican authorities. From time to time, as these insults have occurred, demands for satisfaction and redress have been made by our successive public ministers at the City of Mexico; but almost all of these demands have hitherto proved unavailing. * * * The committee, notwithstanding, regret to be compelled to state that all of the causes of complaint against Mexico have occurred since the conclusion of this treaty.

"If the government of the United States was disposed to exact

strict and prompt redress from Mexico, your committee might with justice recommend an immediate resort to war or reprisals."

Then follows an assent to the sentiments contained in the President's message, which counselled forbearance and moderation by giving to Mexico one more opportunity to atone for the past, etc. History tells us that these injuries and maltreatments of American citizens and the confiscation of their property was one of the *casus belli*, which brought on the late war with Mexico, and which culminated in the peace of Guadalupe, which gave to us a vast and magnificent territory, of which New Mexico forms a part. If the United States government, with all its military power, both by land and sea, could not extort justice save by war, how could its private citizens obtain redress in the courts of Mexico or through the justice of her government?

Heath could only rely on his own government for protection, and it was not until the Act of March 3, 1891, creating the Court of Private Land Claims in 1891, was established by Congress that Heath could assert in a legal form his legal rights under this grant.

Under this Act Heath's heirs and legal representatives filed a petition in the Court of Private Land Claims sitting in and for the Territory of New Mexico, on the 9th of January, 1893, setting up the facts stated in this brief in the statement of facts, and claiming that the grant to said Heath by virtue of these facts and *expediente* became an absolute and perfect grant; that the said Heath obtained a perfect title to said land; and that the petitioners as his heirs, descendants and legal representatives of his heirs and decendants, have become and are the owners in fee of said lands and entitled to the same as an absolute and perfect grant, and are entitled to hold and possess the same, and prays that the court may consider the validity of said grant of land, and that the tract with the boundaries herein set forth be confirmed unto the plaintiffs, their heirs and assigns forever, with prayer for general relief, etc.

To this petition the defendants filed a demurrer, the first assignment for cause amounting to a general demurrer.

After the demurrer was argued at length, the court overruled the demurrer and ruled the defendants to answer. (Rec. 14, fol. 24, 25.) After the answers were put in, and replications filed thereto, and the evidence taken, all the facts set forth in the petition were fully established and the court was called upon again to determine whether as a matter of law the petition was to be sustained.

The court found as matter of law, the facts set forth in the petition being fully established, that the prayer of the petition

should be denied. The opinion is found at page 259 of the Record, fol. 364.

The answer of the United States government to the petition is substantially the same as are all the answers filed in the case, and is representative of all the defenses raised, except that of subsequent purchasers. It is found on page 23 of the printed record, fol. 41.

The answer, after calling for proof of the allegations of fact in *pais*, professing to have no knowledge of the same, and demanding strict proof, goes on to deny that by virtue of the proceedings of the Ayuntamiento and of the said Heath any lawful title to the said tract of land in the petition described vested in him, or that the said Heath obtained an absolute or perfect title to said tract of land. This amounts to a general demurrer, and which was, when so filed, overruled by the court. The answer then sets up that under the provisions of the law of January 4, 1823, or the provisions of any other law then in force, the Ayuntamiento of El Paso had no power or authority to make a grant of land to Heath in the manner and form set forth in the petition. That the constituent Congress of Mexico decreed on April 7, 1823, that all acts of the preceding government, being the government by which the said colonization law of January 3, 1823, was enacted, from May 19, 1822, to March 29, 1823, were illegal, and subject to be revised, confirmed, or revoked by the government then established, and that the said colonization law of January 4, 1823, was afterwards, to wit, on the 11th of April, 1823, by the decree of said Congress, *suspended* until a new resolution on the subject shall have been passed; by reason whereof all the proceedings of said Ayuntamiento of El Paso respecting the said alleged grant of land were illegal and void and of no effect.

For a further defense it answers that, on the 11th of April, 1823, the constituent Congress suspended the said colonization law, and authorized persons who had acquired rights under said law to present their claims to the *new* government for their ratification or rejection, and that said Heath did not, nor did any one for him, ever present to said Mexican government as provided by law said claim for ratification and approval, and by reason of his failure to so present the same, abandoned and released the same to said government.

For a further answer, that from the time of said grant until the treaty of Guadalupe-Hidalgo said Heath never presented to the Mexican Government any claim for said property, but totally abandoned it.

In the answer of the United States it is set up that on the 11th day of April, 1823, the constituent (meaning the sovereign) Congress

suspended the colonization law of January 4, 1823, and authorized persons who had acquired rights under said law to present their claims to the new government for their ratification or rejection. (Rec., 25, fol. 44.)

This alleged provision is not found in any law of Mexico, and counsel must have made the allegation under a misapprehension. They probably were led into the error because Austin made such an application, but Mr. White, in his Recopilation, tells us why this was done (1 White's Recop., 569). He tells us "that on the 21st of "February, 1823, information was circulated in the city of the gen- "eral defection from the Emperor * * * and some were of an "opinion that all his acts would be annulled by Congress. This "would have thrown Austin back to where he started a year before, "and therefore too important a matter to be left unattended to. He "consulted several lawyers and other persons of information on the "subject. Some gave the opinion that all the acts of the govern- "ment *de facto*, of such individual nature as this, where the rights "and interests of individuals were alone concerned, without being "in any way connected with the general politics of the government "or nation, would be good, and others thought that it would be safer "to obtain the sanction of Congress. It was sufficient for Austin "that any doubt appeared to exist, and he determined to suspend "his journey to Texas and wait the meeting of Congress, which it "was now evident must soon take place."

If it were true that such a provision had been made on the 11th of April, 1823, or at any other time, it could not compel Heath to submit a vested right to Congress under penalty of having his right destroyed. As we have seen, under the law of Spain the king could not revoke a grant unless the grantee was in fault, and that as Iturbide had conferred on him only such powers as the king of Spain possessed under his constitution, neither Iturbide nor the government which succeeded him and which adopted the Plan of Iguala and the Treaty of Cordova for its constitution, both providing that the government should be under the laws of Spain, so far as not inconsistent with this plan and treaty, could not pass a law which would compel Heath to submit his title for confirmation or rejection.

That from the change of sovereignty under the treaty of Guadalupe-Hidalgo to the institution of this suit, notwithstanding the law of July 22nd, 1854, existed for the assertion of said claims, said Heath (notwithstanding he was dead at this late date) did not assert any interest in or right to said property in any way, and hence his title was lost if any he had.

Sets up that seventy years of laches bars his right.

Sets up that neither Heath at the time of his death in 1853 nor his heirs at any time were citizens of Mexico and therefore could not acquire by inheritance any right, title, or interest in or to the land.

Sets forth that part of said land which was included in the Gadsden treaty, made December 30th, 1853, was, while it was Mexican land, about the year 1851–53, granted to the Commander-General of the Republic of Mexico to found and establish colonies in the State of Chihuahua, Republic of Mexico, and who granted part of these lands included within the outer boundaries of Heath's grant to several colonies of Mexican citizens and distributed said lands among said colonists.

Sets up the Baca grant, made by the Mexican government before the Gadsden treaty, which was within the out boundaries of this grant; also the like grant to the Dona Anna Bend Colony.

The grantees of these grants have also filed answers substantially the same as that of the United States.

Sets up also that part of Heath's grant was afterwards granted by the Mexican government to Garcia, and that by an Act of Congress approved on the 3d of March, 1891, the 4th clause of section 13 of said Act and the 14th section of said Act, the petitioners were estopped and prohibited from claiming or setting up any claim to any part or portion of the said Bracito grant so made to Garcia and so allowed and lawfully acted upon by the said Congress of the United States, and so conveyed and granted by the said United States to the said Garcia and his legal representatives as aforesaid.

These are substantially all of the matters of defense presented by the defendants to defeat Heath's heirs and legal representatives from receiving any portion of the land granted by the Ayuntamiento and of which Heath was put in possession and to which he brought his colony of families together with all that was necessary to cultivate and develop his grant, and upon which he remained with his families until he and they were driven away and his property, costing upwards of $75,000, was practically confiscated by a new and revolutionary government, he and they were banished under penalty of imprisonment, or death should he return. Under these circumstances he returned to America, where, a year before, he was one of the wealthiest men of Missouri, to languish out the balance of his life in bankruptcy. He died in the year 1851 or 1852. (Rec. 56.)

Law Under Which the Grant was Made.

This grant was made under and by virtue of the colonization laws, Imperial Decree No. 5, of the National Junta of the Mexican empire, January 4, 1823.

White's Recop., p. 588.
Hall's Mexican Law, Art. 256.
Early Laws of Texas, p. 42.
Rocknell's Spanish Laws, p. 617.

The provisions and sections of this law necessary and essential to a proper construction of our case are as follows:

Augustin, by divine providence and by the Congress of the nation first constitutional Emperor of Mexico, and Grand Master of the Imperial Order of Guadalupe, to all who shall see these presents: Know ye that the junta nacional instituyente of the Mexican empire has decreed and we sanction the following:

The junta nacional instituyente of the Mexican empire, being convinced by the urgent recommendation of the government of the necessity and importance of giving to the empire a *general law of colonization, have thought proper to decree as follows:*

Section 1.—*Civil Rights.*—The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire.

Sec. 2.—*Distribution of Lands.*—To facilitate their establishment the executive will distribute lands to them, under the *conditions and terms herein expressed.*

Sec. 3.—*Duty of Empresarios.*—The empresarios, by whom is understood those who introduce at least *two hundred families*, shall previously *contract with the executive*, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary, in order that with this necessary information the executive may *designate* the province to which they must direct themselves, the lands which they can occupy with *right of property*, and other circumstances which may be considered necessary.

Sec. 4.—*Settlement of Families.*—Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in *conformity with the instructions of the executive, may designate the lands* corresponding to them, agreeably to the industry which they may establish.

Sec. 5.—The measurement of land shall be the following:

Establishing the vara at three geometrical feet; a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios; *five sitios shall compose one hacienda.*

SEC. 7.—*Labor Defined.*—One labor shall be composed of one million square varas; that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

SEC. 8.—*Amount of Land to a Colonist.*—To the colonists whose occupation is *farming* there cannot be given less than one labor, and to those whose occupation *is stock raising* there cannot be given less than one sitio.

SEC. 9.—*Same.*—The government of *itself*, or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

SEC. 10.—Establishments made under the former government, which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

SEC. 11.—*Equal Distribution.*—As one of the principal objects of laws in free governments ought to be to approximate, so far as possible, to an equal distribution of property, the government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands which have accumulated in large portions in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands, to be fixed by appraisers.

Sections 12, 13, 14, 15, and others omitted relate to cities, towns, villages and questions not material to our grant.

SEC. 19.—*Grants to Empresarios.*—To each empresario who introduces and establishes families in any of the provinces designated for colonization there shall be granted at the rate of three haciendas and two labors for each two hundred families so introduced by him, but he will lose the *right of property* over said lands should he not have populated and cultivated them in twelve years from date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

SEC. 20.—*Alienation at the end of Twenty Years.*—At the end of twenty years each proprietor of the lands acquired in virtue of the foregoing article must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

SEC. 21.—*Same.*—The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting *from the day of the promulgation of this law*, the executive can diminish the premium as it may deem proper, giving an account thereof to Congress, with such information as may be deemed necessary.

SEC. 22.—*Right of Occupants.*—The *date of the concessions for*

lands constitutes an inviolable law for the *right of property and legal ownership;* should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

SEC. 23.—*Cultivation.*—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; *in which case the respective Ayuntamiento can grant it to another.*

SEC. 24.—*Tithes, Duties, etc.*—During the first six years from the date of the concession the colonist shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

SEC. 25.—*Same.*—The next six years from the same date they shall pay half tithes, and half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall, in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

SEC. 29.—*Land May be Alienated.*—Every individual shall be free to leave the empire, *and can alienate the lands over which he may have acquired the right of property,* agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law.

ASSIGNMENT OF ERRORS.

1st. The court erred in ruling that John G. Heath, when he presented himself under the 4th article of the National Colonization Laws of Mexico, of January 3, 1823, to the Ayuntamiento of El Paso, for the designation of lands for the purpose of cultivating the same, and establishing certain arts and industries therein, had no family with him, or families, and therefore was not a colonist within the meaning of said article.

2nd. The court erred in ruling that the Ayuntamiento had no power, under said article 4, to designate to Heath the public lands within the jurisdiction of El Paso but without the presumed pueblo lands.

3rd. That the court erred in ruling, without evidence but as a matter of legal presumption, that the town of El Paso had pueblo land of four leagues square.

4th. That the court erred in holding, without evidence, that Heath, after the grant was made and recorded, had notice before leaving Mexico that his grant would be annulled, and that he could not bring his family and machinery, &c., on account of the disapproval af the departmental assembly of his grant.

5th. In holding that the possession given to Heath of a tract of land known as the Bracito, five leagues square, with its central point

and all its corners definitely fixed, marked and located, was not a perfect grant, but only an allotment or concession, which the authorities, after resolution, could deny at pleasure.

6th. In finding and decreeing that the said petition for the confirmation of the private land claim known as the Juan Gid or John G. Heath grant has not been sustained by satisfactory proof, and that the said title so asserted to the tract of land claimed to have been granted by the Ayuntamiento of El Paso, under the colonization law of Iturbide of January 4, 1892, to John G. Heath is of no validity, and that the said grant or concession is not such a one as the United States are bound to recognize and confirm by virtue of the treaty of cession by Mexico to the United States.

7th. Erred in ordering and decreeing that "the claim to the tract of land known as Juan Gid or John G. Heath grant, situated in the county of Dona Anna, in the Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito Acquia, under a grant alleged to have been made on April 3, 1823, by the Ayuntamiento of El Paso, to John G. Heath, under the name of Juan Gid, is hereby rejected and said petition is dismissed."

8th. The court erred in not sustaining plaintiffs' petition by decreeing that the tract of land described therein, known as the Bracito, at its central point, had been granted to John G. Heath, in April, 1823, by the Ayuntamiento of El Paso, under the law of January 3, 1823, and that the same should be confirmed as the property of his heirs, the petitioners in this case.

There being no patent defects in the grant from the Ayuntamiento to the petitioner Heath, the application by petition to the Court of Private Land Claims should have been allowed, and the only way to defeat the grant is for the appellee to attack the power to make it.

This the appellees do by setting up—

(1) The colonization laws were suspended on the 11th day of April, 1823.

(2) That Iturbide's reign was an usurpation, and as such declared by the national constituent Congress of Mexico on the 8th of April, 1823.

(3) That if the law was in force at the date of the concession the Ayuntamiento had no power to make the grant.

(4) That if they made the grant, they made it subject to the approval of the Departmental Assembly, which was never given.

(5) That he was guilty of laches.

I.

We shall not enter into an extensive or attempt an exhaustive discussion of these questions. The brief of Judge Cessna is so full and abounds with so many citations that we ought not to vex the eye of the court by compelling the court, in some other form, to re-read them.

Before entering upon a discussion of this case, a question meets us *in limini*, which if determined adversely to the appellants, disposes of the case.

It is claimed that at the time Heath obtained his title, or a legal right to his title, such as he could upon application have compelled in her courts of justice the Mexican government to give him the title never existed, because the national colonization law had been suspended, and that the law was no longer in force in the province of New Mexico at El Paso.

The onus is upon the appellee to show that the law had been repealed or suspended at the time Heath's grant was made.

To satisfy this onus, a resolution of the Congress made on the 11th day of April, 1823, declared its intention that in the future the national colonization law of January 3, 1823, should be suspended until otherwise ordered is invoked by appellees.

The translation of this resolution, if such it can be called, does not disclose how it was adopted. It is shown, however, by consulting the originals (Annals of the Mexican Congress, Vol. 2, p. 95), it was a resolution not recorded in the proceedings of the day, but incidentally inserted in the confirmation of Austin's grant, made on that day, and this confirmation is in a foot-note to the proceedings of the day.

The Act of the 3d of January, 1823, like all the laws passed by this Congress, provides at their conclusion that they shall be submitted to the executive for his approval, and if approved, shall print and publish the same.

This resolution or declared intention of the Congress to suspend in the future this law does not pretend to repeal it, and no directions are given that the intention to suspend shall be submitted to the executive, and if approved, printed and published. Indeed this foot-note authorizes the executive under this law of 1823 to approve of Austin's grant and any other of the same kind.

Such a form of a declared intention, or rather such informal

legislative proceedings, could not have the force, under the Mexican law, of suspending or repealing the laws then in force.

Under the plan of Iguala and the treaty of Cordova, the Congress was to govern according to the fundamental laws of Spain, and so was the executive. The Congress took the oath to do so, and this plan and treaty constituted *pro hac vice* the constitution of the Mexican nation.

The civil law of Spain then still governed, and the fundamental law of this country required all laws to be published in order to constitute and complete their validity.

That the publication of a law to be obeyed by the people must be first published in the provinces where it is to be operative is fundamental, and its recognition is ubiquitous in every country governed by rational jurisprudence. It has the sanction of universal law. It was the law of Greece. It was the law of Rome, whether as a republic, an empire, or a despotism.

Caligula was wicked and powerful enough to publish the Roman laws in such a manner as to ensnare and punish the people in ignorantly disobeying them; but he was not powerful enough to dispense with their publication.

The Institutes of the Civil Law of Spain, built on the massive and splendid body of the civil law of Rome, has received a just eulogy from all commentators who have had occasion to refer to it—White, Rockwell, Hall, and others. It extorted from Lord Macaulay a confession that at the time of Charles II it was freer and better than the constitution of Great Britain.

The preamble to this noble code is noticeable for its judicial wisdom. It declares that the only object of law is justice, which is rooted in virtue and which always lasts in the wills of just men and gives and distributes to every one equally his due or right. (L. Tit. 1, p. 3, 2 White's Recop., 72.)

In the front and forehead of this admirable body of laws is announced:

"From the *first principle* it follows, first, that the law is not obligatory, unless published by proclamation or edict executed by order of the magistrate, according to Anto Accordado, L. 12, Tit. 2, Lib. 3, Nov. Rec. Second, that immediately, on being published it binds without any excuse or exemption being admitted, under any pretence of ignorance, because all, without distinction of person or quality are bound to know and study it. (L. 20, Tit. 1, part 1, and L. 1, Tit. 1, Lib. 2, Rec.) * * * That it ought to be clear and intelligible that all may understand it." (L. 28, 13 Tit. 1, part 1; 2 White's Recop., 73.) See Mr. Cessna's brief, p. 77, for further citations.

It is hardly necessary to quote authority to show that this court accepts without reserve so just and enlightened a principle of national and international jurisprudence. (Gonzalies *v.* Ross, 120 U. S. 605–615–616.)

There being no evidence in the record that this declaration of an intention to suspend the colonization law of 1823, other than in the foot-note to Austin's grant, and there being neither request to approve it on the part of the executive, nor a direction, if approved, that it be printed and published, and there being no evidence that it was ever printed or published during all the time that the proceedings occurred which ended in a consummation of Heath's title, the appellees have not established by evidence that the law of 1823 was ever legally suspended or repealed until it was repealed in 1824 under the new colonization law.

There is some evidence to show that this intention to suspend the law in the future was never carried out or consummated.

In the absence of proof that the law was repealed or suspended, the law presumes that it continued in force, and it is not necessary for the appellants to offer any evidence to strengthen this presumption, although there is, as we shall presently see, such evidence in the record.

The law will not presume that to have occurred which is physically impossible to occur. The resolution of the national Congress of the 11th of April, 1823, if intended to have the force of law *propiore vigore* without the executive sanction, and without publication, could not by any possibility, in 1823, have reached El Paso or Rio del Norte on the 17th of April of that year. Less than a week had occurred after the passage of the resolution.

It is plain from the record that the Ayuntamiento and Heath were in ignorance of its existence, and it also is plain that on the 19th day of June, 1823, the governor and departmental assembly had only received a rumor of its existence. If it was anything, it was a suspension of the law in the future, and as the executive did not confirm Austin's license until the 14th day of April, if approved by it at the time, the period of publication would be still shorter—only *three* days. If the law had been published at Del Norte the governor would have been accurately informed as to its contents. If disclosed to the governor or departmental assembly, then the assembly would never have notified, several months afterward, the Ayuntamiento that the colonization law had been repealed. It was physically impossible for the law to have reached El Paso Del Norte—fifteen hundred miles distant, and through a wilderness,—between the 11th or 14th of April and the 17th or 25th of this month.

While the law will presume everything to have been done that the law required to be done, and that the officers doing it had authority to so do, in order to sustain an executive grant, the law will not presume that anything was done at the time or afterwards to defeat the grant.

The Congress which was called together by Iturbide was elected under an Empire, and after electing an Emperor was to proceed to govern under the plan of Iguala and the treaty of Cordova. Its duty was, after the abdication of Iturbide, to either elect another Emperor or submit to the people of the provinces the question what form of government they should have, and to follow the result of the balloting; but they chose first to vent their resentments on the acts of Iturbide, and to declare his acts void and his reign an usurpation. If this were true, they had no occasion to suspend the colonization laws. A void law requires no suspension or repeal.

While it is certain they, on the 8th of April, 1823, declared Iturbide an usurper, it is not clear that they passed any law repealing or suspending the colonization laws. (Ordinances and Decrees of Congress of Mexico, Vol. 2, p. 95.)

On April 16th a decree was entered on their minutes that Iturbide is to no longer be called Emperor.

On the 15th of August, 1823, the Ayuntamiento did, upon a petition similar to Heath's in form, grant to a native Mexican, Juse Lerna by name, 400,000 acres, and which was approved by the departmental assembly. This grant was confirmed in a collateral litigation by the Congress of Chihuahua. (Rec. 249–256.)

Again, Robert Leftwich was, on the 15th of April, 1823, granted a license similar to Austin's, made under the Act of 1823. (Early Laws of Texas, p. 143.)

These grants, made before the Act of the 18th of August, 1824, and made under the Act of 1823, is evidence that the proposed suspension of the Act of 1823 on the 11th of April never ripened into a law, or was ever published as such. (Brownville *v.* Cavazos, 100 U. S. 138–142; Hurdeman *v.* Herbert, 11 Tex. 660.)

II.

The expediente is in the usual and customary form then in use for the granting of lands in Mexico for colonization. Upon its face it is perfect. There is no apparent defect in substance or form.

It is composed of the petition with the decree accepting the same, and, after a legal period had transpired after publication, for native

citizens to make a similar application; the order of reference to officers to survey and put Heath into judicial possession of his lands; the report of these officers in conformity to the order with a complete and accurate map of the survey of the boundaries of the land granted; Heath's and the Ayuntiamento's approval and acceptance of the report; and last, the decree of concession.

A record of all these doings was duly entered upon the minute book of the council.

The grant was also filed, after the territory was ceded to the United States, in the United States surveyor-general's office in New Mexico, and is numbered No. 410 of the old Spanish and American archives. (Rec. 170.)

This is sufficient to satisfy the requirements of the treaty of Guadalupe.

It is claimed, however, that Art. VI of the treaty of 1853, between the United States and Mexico, commonly called the Gadsden Purchase, which provides that "no grant of land bearing date subsequent to this treaty will be considered valid or be recognized by the United States, nor will any grant made previously be respected or be considered as obligatory which has not been located and duly recorded in the archives of Mexico," was not complied with, and the want of which defeats Heath's rights. But a small portion of this land came to us by the Gadsden Purchase, and surely the United States were not making a treaty at this time about titles concerning territory already within the United States. The Gadsden treaty only was dealing with, and referred to, titles to lands over which the United States were to obtain, by the purchase, jurisdiction.

Whether Heath's grant was recorded in any archive other than El Paso we cannot tell. The records of El Paso themselves were mostly destroyed by fire (report of Mr. Sandridge, p. 24, 147), and no record is likely to be found remaining there. We have, however, abundant evidence that it was recorded at this place. Ponce de Leon, secretary to the Ayuntiamento, so certifies. In the absence of other proof, and with the proof of the destruction of the record itself, this certificate is competent to establish this.

A treaty stipulation of this kind is not to be construed *stricti juris*,* but is to have a reasonable construction and to be interpreted to meet its object. These records are recorded in archives established

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U. S. *v.* Aguisola, 1 Wall. 358.
U. S. *v.* Sutherland, 19 How. 364.
U. S. *v.* Arredondo, 6 Pet. 729.
Hornsby *v.* U. S., 10 Wall. 237.

by law for the land grants in the province where they were made, and as such constitute an archive of Mexico.

Williams *v.* Conger, 125 U. S. 359.
Munford *v.* Wardell, 73 U. S. 420.
Anhart *v.* Messiere, 98 U. S. 491.

At all events this provision in the Gadsden treaty applies to only a small portion of the tract granted, the most of the land being acquired under the treaty of Guadalupe.

III.

The grant to Heath was a grant in fee simple.

Heath petitioned for the grant to be made to *him*. His language is, "I ask to be granted to me."

"That the land be assigned to *me*."

"I propose that families of Catholic Christians, and among them mechanics, blacksmiths, armourers, architects, mathematicians, surgeons, &c., and to establish a hospital with the corresponding drug store * * * and also to establish a warehouse stocked with all kinds of goods to sell at wholesale, and to introduce the necessary machines for the manufacture of woolen and cotton cloths, and another for the manufacture of powder, proposing, until the expense of transportation is covered, to furnish the supply of this article that the whole of this jurisdiction may require, at the very low price of one dollar per pound," &c. When we consider the great wealth and executive ability of Heath, this was no idle and insincere offer, and his subsequent performance at once proves his good faith, and demonstrates his ability to do what he promised.

In reading this petition that the land be given to *him*, and the industries he proposed to introduce, we can with propriety say in the language of Mr. Justice Brewer in the case of the U. S. *v.* The Cleveland Cattle Co. (33 Fed. Rep. 328). The language of this petition "suggests a personal business" upon Heath's personal promise and to be conducted by him. It was hardly to be supposed that he intended to take all the heads of these 30 families, including architects, surgeons, mathematicians, in co-partnership in the manufacture of woolens and gunpowder.

While he asks that he be designated as the person for the distribution of the said land, and to be respected as the legal justice for the said families, we cannot fairly segregate a single sentence from the whole context, and to say that with the national colonization law

before him, and which, when read to him, induced him to prepare a petition *de novo*, he would ask the Ayuntamiento to make a contract in the nature of an empresario's when article 4th of this law gave it no such power, is not to be supposed. Heath had been a member of the State convention in Missouri to form its constitution; was a doctor, lawyer, and had been a legislator; it is fair to presume that he intended the land for himself, to be cultivated by himself and to be distributed among his families by himself, and asked, out of abundant caution, that he should be the landlord of his lands, and be permitted to civilly govern them as a justice of the peace.

Of this kind of a concession, Mr. Justice Brewer says in the case of The United States *v.* The Cleveland Cattle Company (33 Fed. Rep. 328): "It is not the bringing of settlers, the establishment of a colony, but the encouragement of agriculture and the arts which is the purpose and consideration of the concession."

Again he says: "It is true, near the close of the petition, they use the word 'colony,' and say that in the spring they will commence operations, which shall be continued until the colony is established. Of course this word makes in favor of an empresario grant, and yet the use ought not to be sufficient to overthrow the clear import of the petitioning clause."

The Scope of the Grant.

It is a grant *in præsenti*, subject to be denounced in case Heath failed to cultivate it as he proposed, within two years from the date of the concession.

It is governed by the rule laid down construing such grants.

U. S. *v.* Arrendondo, 6 Pet. 691.
Miller *v.* Dale, 92 U. S. 473.
Gonzales *v.* Ross, 120 U. S. 605.
U. S. *v.* McLoughlin, 137 U. S. 428.

The Act itself defines and establishes this.

Art. 22 says: The date of the concession for lands constitutes an inviolable law for the right of property and legal ownership. Legal ownership of lands means ownership in fee simple. Lands are not owned in any other way. All other interest in lands nearest to ownership are held in tenancy, as a tenant for life or years. When a statute says that a person shall become the legal owner of lands it means an ownership in fee simple.

Sec. 29 provides that "every individual shall be free to alienate his lands agreeably to the tenor of this law."

This means that in case the lands are not cultivated within two years after the date of the concession, it shall be conclusive evidence that he has renounced his right of property and legal ownership. This is an alienation by statute. This is but a statutory provision for a re-conveyance by statute instead of by deed of retrocession. It is, as our statute of uses provides, that when a party holds but the dry legal title for the use of another with no active duties to perform, to feed the trust, the statute executed and conveyed the title to the *cestui que trust*. This but added another mode of conveyance to those already in use.

The promises of Heath rested in covenant and not a condition precedent that he would within two years engage in the business and industries he proposed as a consideration for the land. Had he given a promissory written obligation so to do, the proposition would be indisputable, and it is not less so when the promise is written in the grant. A promise to pay a sum of money in the future, instead of making gunpowder and selling it at a concession to the grantor, is just as plainly but a promissory obligation.

Whether Heath's conveyance was made on a condition precedent or subsequent (insisting however that it was subsequent), his attempt at performance and its prevention by the government, the grantor, is a performance in law, and entitles him to hold his lands discharged of all conditions; in other words, in fee simple.

If a *limitation* is claimed by statute until the end of the two years for cultivation, it is still a grant *in præsenti*, and it was one by which the estate was to cease upon breach of a condition subsequent to the vesting of the estate.

2 Washb. Real Prop. *457.
Finlay v. *King's Lessee*, 3 Pet. 346.
Nicoll v. *N. Y. & E. R.R.*, 12 N. Y. 121.
Underhill v. *Railroad Co.*, 20 Barb. 455.
Osgood v. *Abbott*, 58 Me. 78, 79.

And upon the question of conditional limitation, the same strict rule of construction against the creating of the limitation is to be applied as applies to conditions subsequent, and for the same reason, viz., that *it tends to destroy estates.*

4 Kent Com. *129–30, *132.
Warville, Vendors, p. 446.
Leake, Dig. Law of Prop. in Land, 238–9.

Norris v. *Renshaw*, 49 Ill. 425.
Gallaher v. *Herbert*, 117 Ill. 168.
Boone v. *Clark*, 129 Ill. 498.
Wilson v. *Galt*, 18 Ill. 431.
Jackson v. *Silvernail*, 15 Johns. 278.
Episcopal City Miss. v. *Appleton*, 117 Mass. 326.

IV.

When was Heath's concession complete? The earlier decisions of the Supreme Court attached a good deal of importance to judicial delivery of possession in Mexican land grants.

Of course when the grant was made upon such a condition, livery of seisin must be always regarded as the condition precedent to the title vesting, *a sine qua non.*

The Act of 3d of January, 1823, does not require it, but makes the date of the concession the date of ownership and ownership in fee simple.

In such cases courts have treated the judicial delivery of possession as rather supplementary and as "designated in defining boundaries," which the official surveyor was to make, and which it was the fault of the official officer if he did not so make. This court has never been called upon to decide whether livery of seisin is necessary under statutes which are provided for passing lands by grant and where the law requires such grants to be recorded.

In a country like Mexico, where the people are fond of pomp, ceremony, and public display, all customs involving these are long kept up after the substance which they symbolize have become useless and without practical vitality or utility.

When was Heath's concession complete?

The later decisions of the United States Supreme Court have not attached the same importance to judicial delivery of possession in Mexican land grants as were supposed to be attached to it in the earlier decisions on grants requiring livery of seisin to *complete* the grants, but an order that this must be done as a condition precedent to the title vesting must always be regarded as an essential and *a sine qua non.* But in statutes like the Act of 3d of January, 1823, under consideration, which does not *eo nomine* require it, the courts have treated it as rather supplementary. This court has laid great stress on this action as "designating and defining boundaries" which the official surveyor was to make, and which it is the fault of the officer if he does not make; but the court has never gravely considered or

decided whether under such a statute it is a condition precedent. (U. S. *v.* Cleveland, &c., 33 F. Rep. 328.)

In England, so soon as registry laws were created by Stat. 8 and 9 of Vic., the ceremony was useless, and by a nation distinguished for its common sense it was at once abandoned.

Massachusetts had it but a little while, but in Pennsylvania, Connecticut, and Kentucky it never occurred, nor does it now under our registry laws occur in any State of the Union. The reason was plain, the estate passed by deed, and registry gave the notoriety which livery of seisin was supposed to secure.

This court very properly, at an early date, in passing upon a Mexican grant in Malarin *v.* U. S. (1 Wall. 289), decided that by the terms of *this* grant judicial possession was necessary to complete the title.

The conditions annexed to this grant required the grantee to solicit judicial possession from the proper judge. In compliance with this requirement, within four months after the issue of the grant, the grantee presented the instrument to the judge of the district and requested him to designate. Under such a condition precedent livery of seisin is necessary. The *syllabus* of this case has been followed as laying down a general rule that livery of seisin is necessary in all cases of Mexican grants.

Following in the wake of the decision in this case, Mr. Justice Field, in the case of Graham *v.* U. S. (4 Wall. 261), treats the *dictum* as *an observation*, and the grant then under consideration perhaps justified its application. The learned Justice says: "As we had occasion heretofore to observe, the Mexican law as well as the common law made a formal delivery of possession or livery of seisin of the property essential after the execution of a grant for the investiture of the estate. Malarin *v.* U. S. 1 Wall. 289." Yet we have seen that this case lays down no such general rule applicable to the passing of all titles, but only decided the case before it—a case so requiring. No doubt the common law of Mexico, like our own common law, requires it, but our common law grew a dead letter in the presence of a living statute more in touch with the modern modes of doing business, and this new national colonization law, a parvenu without being encumbered by ancestors, gave to this new government a complete law for granting lands, and when coupled with the requirement that the title papers should be recorded in a book kept for that purpose, why, then, should not a grant made under a new government, which was not permitted to live long enough to have a custom established, receive in the courts of the United States at the suit of her own citizens the same consideration and rule of property

which she applies to the construction of her own statutes and customs? If the custom gives way in the one case, the reasons being the same, why should it not give way in the others? Is not the liberal, enlightened, and just judicial views of Mr. Justice Balwin, in Rutherford *v.* Green (12th Wh. 203), on the construction of this colonization law, in point, when it is sought to defeat a title which the evidence shows had cost the grantee on the faith of it a sum of money which, at the time, was a vast fortune, and caused him to incur so much labor in forsaking his home in the vain attempt to establish another, by adding to the terms of the grant conditions not embraced in the Act? The learned Justice, in speaking for the court, says:

"Whatever the legislative power may be, its acts ought never to be construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and show a clear design to effect the object. No *general* terms intended for property to which they may be fairly applicable and not particularly applied by the legislation, no silent implied and constructive repeals ought ever to be understood as to divest a vested right." (Approved in U. S. *v.* Arredondo, 6 Pet. 733.)

If the mere fact that the expense of the survey and the payment of the fees gave the grantee a title in Fremont *v.* U. S. (18 How. 55), with how much more reason has Heath a right to claim his title when he did all this and all else?

In speaking of the Spanish land grants of Louisiana and Florida, this court says, in Fremont *v.* U. S., 17 How. 551:

"Upon the receipt of the petition the governor or other officer who had the power to grant issued what is usually called a concession to the party, authorizing him to have the land surveyed by an official officer of the province to grant in *absolute ownership*."

In this case the absolute ownership passes when the official officer surveys the land and makes the grant, and the date of concession gives the grantee but an inchoate right to the land, made perfect by his having the land surveyed according to the terms of concession.

Not so with Heath's concession. Under the Act of 1823 it is expressly provided that the right of property and ownership shall be from the date of concession, and not from the date of livery of seisin.

Grants made in California after the Act of 1823 was repealed, and the Act of 1824 was enacted, authorizing the province of California to establish the mode of making the conveyances, and such mode

had been established, livery of seisin was necessary, because made so by positive enactment.

If Heath's concession was made on the 3d or 7th, or any date before the 11th of July (provided at this time publication had been made of the supposed suspension of the law of which there is no proof), or, indeed, any date prior to its publication, then he had obtained a perfect title, or if only a right to a legal title such as in an honest court of justice in Mexico would have been awarded him, then in such a case he has a right to file his petition in the Court of Private Land Claims, and should have his claim allowed.

V.

In answer to appellee's second proposition, that Iturbide's reign was an usurpation, and as such declared by the national Congress null and void on the 8th day of April, 1823, and that all laws passed under it as a consequence were inoperative and void.

In 1821 a successful revolution on the part of Mexico was begun, under the lead of Iturbide, against the Crown of Spain. Its object was the independence of Mexico and the establishment of a constitutional monarchy. February, 1821, a treaty was concluded at the city of Cordova between D. Juan Donohoe, Vice-Roy of Mexico, &c., and Iturbide, and the plan of Iguala was adopted February 21, 1821. The plan of Iguala was for—

(1) The preservation of the Catholic religion.

(2) The Independence of Mexico under a constitutional monarchy with some member of the reigning family of Spain on the throne.

(3) The amicable return of the Spaniards into Mexico.

These were called the Three Guarantees of the Treaty of Cordova.

The treaty of Cordova provided for the independence of Mexico with Ferdinand VII, or some other independent sovereign of loyal lineage, as its Emperor.

Iturbide, on the 27th of September, 1821, took possession of the City of Mexico and formed a Junta Soberna guber nativa—*i. e.*, a sovereign governing junta composed of the most illustrious and distinguished men and patriots of Mexico. They first took the oath of allegiance to support the plan of Iguala and the treaty of Cordova, and organized under Iturbide as President. Under section 7th of the plan they were to proceed according to the laws of Spain.

This junta, under the plan of Iguala, called a congress to form a constitution, and to elect as Emperor whatever prince named in the

treaty of Cordova should accept the crown. After these congressmen were elected they took a like oath. The treaty provided that in case Ferdinand VII, Arch-Duke Charles of Austria, and Prince Luca should be invited, and, in case they declined, Congress was free to elect whom they pleased as Emperor.

This Junta issued the Act known as the Act of Independence. This Act also provided that the government is to be established in accordance with the plan of Iguala and the treaty of Cordova.

Upon the treaty of Cordova being rejected by Spain, Iturbide was, on the 18th of May, 1822, proclaimed and elected Emperor of Mexico, under the title of Augustus I. Iturbide took the oath of office. A month afterwards Congress unanimously established the title and address of the royal family. On the 21st of July, 1822, or a few months after he had been elected, Iturbide and his wife were anointed and crowned in the Cathedral with all the solemnity observed on such occasions. Nearly a month afterwards the throne was made hereditary in his family.

The choice of Iturbide as Emperor was ratified, without opposition, by the provinces, and which were up to that time free, several and independent States, and Iturbide found himself in peaceful possession of a throne to which his own abilities, services, and a concurrence of favorable circumstances raised him.

Upon the declination of the treaty by Spain, a *change of person*—who should be the sovereign, rather than a system—was contemplated.

After the crowning of Iturbide, it became necessary to designate the powers of the executive to prevent them from interfering with those of the Cortes. On this occasion the dangers and difficulties governing the nation, without a written constitution, were forcibly urged by some of the most enlightened members, and it was proposed to adopt that of Spain until they could form one of their own. This measure was agreed to, unless at variance with the plan of Iguala, the independence of Mexico and the decisions of the Cortes. Annals of Mex. Cong., 287, 293, 295, 299.

These various Acts of the Cortes in the provinces establish that, *inter sese*, the reign of Iturbide was, during its existence, not only a *de facto* but *de jure* a valid government, and all contracts made between this government and its subjects or foreigners is legal and binding.

A grant of land made under Iturbide's authority was, under the constitution of Spain, which was adopted for his authority, irrevocable, unless through the default of the grantee. Novisima Recop. L. B. 3, Tit. 5, L. 1; 2 White's Recop. 99.

That upon the recognition of the government of Iturbide as an empire by any other government it was valid at the courts of the country so recognizing.

It is a settled rule of both domestic and international law, and so laid down by the publicists of Europe and the decisions of every enlightened court in christendom, that upon the recognition of the executive department of government of a foreign nation it is not open to the courts to question it. Emperor of Austria *v.* Day & Kossuth, 3 D. Gex. F. & J. Rep. 217.

This principle is an integral part of the law of nations, and the United States, being one of this family, is, in the absence of positive legislation or treaty, governed by it, and through the government, its courts.

Under the treaty of Guadalupe these laws are recognized for the enforcement of grants similar to this, and under the Act of 3d of March, 1891, the custom and law of nations are expressly provided for in governing the court in its judgments.

In addition to this, the President of the United States, on December 14, 1822, received Don Jose Manuel Zoyaya, who was presented by the Secretary of State as Envoy Extraordinary and Minister Plenipotentiary from Mexico, with numerous suites of officers. Niles Reg., Vol. 23, p. 24.

On April 26, 1822, Mr. John Quincy Adams, Secretary of State, in reply to a protest from the Spanish Minister, wrote a letter on the 6th of April, 1822, in which he recites that the independence of Mexico has already occurred. Annals of Cong. No. 39, 17 Cong. 1821–22, pp. 20, 99, 21, 35.

It is true that Congress did not until some time later recognize the independence of Mexico, but under the power given to the President of the United States to receive ambassadors the executive and not the legislative department of the government was authorized to recognize the existence of foreign nations.

VI.

If appellees' proposition that Iturbide's reign was declared by the national Congress an usurpation were true, the consequences would not follow so as to invalidate Heath's grant.

Exhibit A (Record, 168, folio 269) is a copy of the expediente, recorded in the book of records of land grants at El Paso. We claim that this expediente gave Heath his title *in præsenti.*

It is dated April 3, 1823, but the petition upon which it is granted

is dated "April 7, 1823." The supplementary proceedings closed on the 25th of April. The averment of the expediente as a solemn record is to be taken as true. Youtz *v.* U. S., 23 How. 484; McGarraghan *v.* New Idria M. Co., 49 Cal. 331; Teschemaker *v.* Thompson, 18 Cal., p. 11; Brannan *v.* Mesick, 10 Cal. 106.

The expediente's recitals, then, are to be taken as true, and it recites that on April 3 the grant was made.

The declaration made on the 8th of April, 1823, by the Mexican Congress, was made *flagrante bello*, and was not intended to be a repealing law. If it were so intended and could have such an effect, it would have repealed all the laws made by the prior Congress.

The declaration did not receive or require the executive sanction, nor did Congress require nor order the same to be published as a law, nor was it in fact so published.

In international law such resolutions are not respected as having the force of law.

History furnishes a similar parallel and proves at once the harmless malice and impotency of this *brutum fulmen*. After the abdication of Richard Cromwell, and upon the assembling of the first Parliament of Charles II, which occurred about the 20th April, 1660, a few hot-headed men wished to bring in a bill which would at once annul all the statutes passed by the Long Parliament and its successors, but the good sense and love of justice, and the learning of the law judges in the House of Lords, did not permit Parliament to proceed quite to this length, and while by the statute of Charles II, Chap. 12, it was declared that the name and style of the liberties of England, and the name and style of the Protector of the Commonwealth of England, Scotland and Ireland, etc., "that the names and styles aforesaid, and every one of them, are most rebellious, wicked, traitorous and abominable usurpations, detested by this present Parliament, as opposite in the highest degree to His Sacred Majesty's most just and undoubted right," yet no one would suppose that the treaties and covenants of the greatest prince that ever sat upon the English throne, though of no royal lineage, were null and void on this account, and a grant of public lands made by him during his protectorate would not be regarded by England itself, or when brought in question involving a matter to be settled by international law, in a foreign court, as null and void. Political acts like the confiscations of estates for political offenses, the proceedings of the High Court of Justice, political prosecutions, as impeachment for treason, might be so treated by a new government established on the ruins of the old, but sales of estates made by virtue or pretense of

any act ordered by the Long Parliament would be confirmed in every English court of justice.

In the case of the Emperor of Austria, whose title to the crown was sought to be questioned, and the point raised that the father of the Emperor was still alive, and hence his title to the throne was superior to that of his son, the court says that such a legal contest cannot be entertained in a foreign court. The court asks, *in arguendo*, should we permit any claim to the sovereignty of France to be made in an English court by the Comte de Chambord or the Comte de Paris, or "suffer any inquiry into the coup d'état by which the republic was overturned in 1851, or the fairness of the subsequent election of his imperial majesty by universal suffrage?"

VII.

The Act of January 3, 1823—The National Colonization Law.

The Emperor Iturbide, being *dominus rei*, as the source and fountain of the title to the public land, just as, and to the same extent, as the King of Spain, under its constitution, was the owner of all the public lands under the dominion of the Empire, and as such held and disposed of them, not only by virtue of his imperial prerogative (U. S. *v.* Sandoval, 167 U. S. 296), but also by the power conferred on him by the Cortes to hold and have such powers as the King of Spain had possessed; and having before him several petitions, some of empresarios, and others of colonists, he found it necessary, in order that there should be no favoritism in the granting of public lands and that the rights of all who should apply should be equal, to submit to his Junta to frame, pass, and submit to him a suitable law in order that he and they might better lay the foundation for a great populous and prosperous empire.

VIII.

The Power of the Ayuntamiento to Grant the Colonists who shall Present Themselves before this Body asking for a Grant, &c., under the Act of the 3d of January, 1823.

Before considering the question as to this power under the Act of 1823, it might be useful to briefly inquire into the powers previously exercised and the office of the Ayuntamientos heretofore performed in the Spanish government's *modus operandi* of granting public lands.

Under the Act of January 4th, 1813, the Ayuntamiento were authorized to make grants of land other than pueblo lands, with the subsequent approbation of the government, but it was held that the neglect of the Ayuntamiento to so report, did not vacate the grant. U. S. *v.* Arredondo, 6 Pet. 696; Maxwell Land Co., 139 U. S. 569; McMicken *v.* U. S., 97 U. S. 204–216; Hale *v.* Russell, 101 U. S. 509.

Sometimes the Cabeldo (town council) was required to advise the viceroy and governor as to the lands that should be granted, and the viceroys could only grant on such advice. 2 White Recop., 50–51.

It is not singular, therefore, to find a provision in a national colonization law, under the new *regime*, which authorized the Ayuntamiento to grant lands in the vicinity of their own to colonists.

It is perfectly plain that Iturbide intended to give to colonists their lands without compelling them, in many cases, to travel thousands of miles to present themselves to him in order to obtain them. Austin did this, and to keep from being murdered, or robbed, traveled in the disguise of a filthy, ragged beggar. Certainly such experiences as he had would not encourage foreigners to tarry and settle in such a country, or make such a journey to ascertain whether a hacienda should be assigned them in a place remote from the capital, and situated in an independent province, and as a consequence, directed to return and present himself to the Ayuntamiento nearest where his coveted land were situate; hence two distinct kinds of persons were contemplated in the distribution for settlement upon the public land. Section 3 provides for contracts to distribute lands to foreigners introduced under the contract made with the Emperor. Section 19 of the Act provides for grants to each empresario who performs his contract, as he performs it, and section 4, which applies only to colonists who are not embraced within a contract made with an empresario, provides:

"Families who emigrate, not included in a contract, should immediately present themselves to the Ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish."

If Heath was entitled to have his lands under this Act at all, it must be under this section; in no other way could a foreign Catholic colonist obtain them; and if the Ayuntamiento were not authorized to designate them, no other body, civil or political, was authorized. The article provides that the application shall primarily be made to

the Ayuntamiento; the colonist shall not through any preliminary course or any intermediate channel present himself, but shall immediately, without intervention, present himself to this body, in order that, in conformity with the instructions of the executive, they may designate the lands.

We find that under the laws of the Indies, Liv. Tit., 2 L. 1, the word which in Spanish stands for "designate" is synonymous with the English word "grant." In one of the King's edicts it is provided: "The places which shall be designated to them (Knights, Soldiers, and Peasantry) by the governor, he will graduate such grants among them." (White's Recop., Sec. 74, p. 49.) The same language occurs in many edicts of the King of Spain, but space is not permitted for further citations.

By the promulgation of the Act of January 3, 1823, the instructions as to how the lands should be distributed were provided for, and were obligatory upon the Emperor, the Ayuntamiento, and the foreigner taking lands under them. The Emperor could give no instructions which were not embraced in the Act, and by the imperial sanction and publication of this Act its provisions contained all the executive instructions which the Ayuntamiento could have, and the foreigner took his grant subject to this law.

By the promulgation of this law all prior laws of Spain in conflict with it—written or unwritten, customary or otherwise,—as to the granting of public lands, were repealed, if, indeed, they had not been already repealed by the establishment of the independence of Mexico on the 24th of February, 1821, *for the King could then no longer hold or grant lands in Mexico.*

So soon as the Anglo-Saxon and Anglo-American legislatures passed laws of conveyancing (*i. e.*, that lands should pass by deed, for instance), and especially when registry laws were provided for, the custom of livery of seisin fell into disuse. The act of recording takes the place of that notice and notoriety which livery of seisin was instituted to give when divorced from feudal tenures.

The common-law modes of conveyancing of real estate were, if not repealed, abandoned. Livery of seisin became obsolete when it was provided the titles to lands should pass by deed and be recorded, and so in America, when the laws of inheritance were passed giving specifically the power to make wills *sub modo*, and the law of dower and courtesy were regulated by statutes, the common law governing these things was repealed.

It has frequently been held that the national colonization laws

Misplaced. see page 28.

under the Act of the 18th of August, 1824, had, in legal effect, repealed all prior laws, including the Act of 1823, and there is no valid reason why the Act of 1823 did not have as to laws prior to this the same legal effect.

U. S. *v.* Vallego, 1 Black, 541.

U. S. *v.* Vigil, 13 Wall. 450.

So soon as a party receives his deed under these modern statutes, and so soon as a patent issues and is delivered, the title passes to the grantee. So soon as the *expediente* is made, and when the *testimento* is delivered to the grantee, his title is perfect, and no livery of seisin, or survey is necessary unless the latter is required by statute or the grant so prescribes.

The 4th section of the Act of 3d of January, 1823, is the only section which makes provision for the distribution of the public lands to colonists. No one is designated in this article except the Ayuntiamento, and it provides that upon a colonist presenting himself, having a family, the Ayuntiamento are to designate the lands to him, corresponding to the industry which they may establish.

No form of doing this is prescribed, but the 34th article of the ordinances establishing the Council of the Indies requires that the applicant shall in a petition declare what he intends to ask and what he promises. (2 White's Recop. 35.)

This ordinance, although repealed, in consequence of the revolution, it became and was the universal custom and practice throughout the country in the time of the passage of this ordinance until recent times to so petition. Hence Heath, following this practice, petitioned the Ayuntamiento under the colonization law of 1823, and in the petition stated what he asked for, and recited what he intended to give as a consideration. Time was given for the native Mexicans to have an opportunity to make a like petition, and upon failure of any such doing so, the Ayuntamiento proceeded to accept his proposition and to deliver the grant to him, afterwards making a minute of the proceeding, in the appropriate book for the recording the making of such land grants, and delivered to Heath a duplicate of his title, retaining the original in the archives, &c. When this was done, Heath's grant under the statute was perfect, giving him an ownership in the land, subject to being determined by non-occupancy and non-cultivation. He was to cultivate within two years from the date of the concession. If he failed to so cultivate under article 23 of the Act, which is germane and cognate to the matters provided for in article 4, the Ayuntamiento had the power to "grant his lands to another."

It is perfectly plain that the grant, and the "grant to another" was to be the act alone of the Ayuntamiento and no other agent of the government was to control these grants.

No one would contend that the departmental assembly could under this law have interfered with or made null the grant made by the town council "to another." Why, then, not being nominated or mentioned in article 4 of this Act, the departmental assembly, governor, or a major-general, should take any power under it, it is difficult to perceive. They were strangers to it; not once anywhere mentioned or referred to in any article of the Act. There is no pretense under this Act that they could make a grant; there ought to be none that they had any power under the Act to veto any grant made by the town council, under either article.

The conclusion is irresistible that Heath, upon the provisions of the Act of 1823 being read to him, and the Ayuntamiento in reading it to him, regarded him as a colonist, and as such he fell within the provisions of section 4. This is a cotemporaneous construction of the decree and shows how all parties at the time understood it. If it were proper for the Ayuntamiento to grant the lands after two years from the date of the original grant in case of non-cultivation by the colonists, we can perceive no reason why the Congress might not have safely trusted the Ayuntamiento with the power in the first instance. The letter of the Ayuntamiento which accompanied the petition of Heath to the Emperor for the grant of these lands fully demonstrated the worthlessness of the lands and the worth of Heath's offer. A power to convey lands on behalf of the government, like the grant itself, may be construed strictly in favor of the government. It is for the government to say what persons or person shall exercise this power, and when it declares in favor of any particular person it excludes all others. Therefore, the best answer to the objection that the Ayuntamiento ought not to have such a power because they are remote from the seat of government, and as a consequence might abuse it, is, first, that the colonization law was a general colonization law to empower the Ayuntamiento to make grants to colonists, and, second, which disposes of the whole matter, the Emperor and his Congress wanted it that way, and neither the departmental assembly, though perhaps its vanity might be wounded by the neglect, nor our own courts, can make any valid objection that the executive and legislative so declared. U. S. *v.* Vigil, 13 Wal. 451–452.

In the case of Heirs of Hollowman *v.* Peibles, 1 Tex. 697, 698, it was said, in construing the articles of the Act of January 3, 1823:

"From these articles there can be no doubt that extensive authority was vested in the Ayuntamiento in issuing, granting, and revoking, and *re*granting titles to land under the colonization law of 1823."

Unless the Act of January 3, 1823, clearly discloses that the Ayuntamiento had no authority to make the grant, it having done so under a construction of the words of the Act, which might, perhaps, create a doubt, is conclusively presumed to be within its powers.

To be at once in doubt is to be at once resolved that such power was theirs. The courts will require very full proof that the Ayuntamiento has transcended its powers. U. S. Arrendondo, 6 Pet. 691–727; Jenkins *v.* Chambers, 9 Tex. 167.

The ordinary presumption that an official who makes a grant had power to make it is as to Mexican grants, owing to its daily and almost hourly fashion of shuffling off one form of government before being on with the new, which government, "like the snow-flake on the river, a moment there and gone forever," is *sui generis et ad patria*. When applied to such a government it is almost a conclusive presumption.

Mr. Justice Brown, in the case of Crespin *et al. v.* U. S., decided in November of this term, 1897, said: "Owing to the frequency with which the government (of Mexico) was changed—usually by military violence—between the time the Republic gained its independence in 1821 and the treaty of Guadalupe-Hidalgo in 1848, the revolution, accompanied with changes, annulled by decrees the acts of previous governments, cancelling grants and putting new regulations in force with respect to the disposition of the public lands, the Supreme Court, as early as 1832, in U. S. *v.* Arrendondo, 6 Pet. 691, laid down as a general proposition that the grant itself was *prima facie* evidence of its own validity, and that it would be presumed to have been regularly issued," and to the same effect is U. S. *v.* Clark, 8 Pet. 436; U. S. *v.* Percheman, 7 Pet. 51, 52, 94; Strothers *v.* Lucas, 12 Pet. 410–437; Reynolds *v.* West, 1 Col. 322, 336; Jones *v.* Garza, 11 Tex. 186–201.

After Heath's grant was made, two grants were made, one under section 3, of January 3, 1823, to an empresario by the name of Robert Leftwich on the 15th day of April, 1824, four months before the Act of 18th August, 1824, was passed and the other by the Ayuntamiento of El Paso, on the 15th of August, 1823, to Jesse Lerma. (Rec., pp. 249, 256.)

As a foot-note to the proceedings of the 11th of April, 1823, of the Congress, the day that Austin's grant was confirmed, it appears

that it was its intention that the Act of 1823 was for the future suspended, but no order made for the publication, and no evidence is introduced that it ever was so published. When it ceased to be suspended, we cannot tell, but from the fact that on the 15th day of April, 1824, a petition was granted under it for a contract, and from the fact that the town council of El Paso made the grant under it of the 15th of August, 1824, three days before the Act of 1824 was passed, which grants presume the power to make them, it may, as a legal presumption, be regarded as established that such intention to suspend was, by Congress, abandoned.

IX.

It is proper to consider the grounds upon which the Court of Private Land Claims bottoms its judgment in dismissing the appellants' petition.

The first grounds are that, in the court's "judgment, the power conferred upon the Ayuntamiento by the decree with reference to foreigners emigrating was simply to allot them lands *within* the town grant after they had signified their desire to settle in that place." (Rec., p. 291, fol. 367.) Before announcing this judgment the court gives some of its reasons for reaching its judgment. These reasons are: "We think there are two grounds upon which the claim should be rejected: First, it was *families* not included in a contract alone which the Ayuntamiento was empowered by the fourth section of the decree to settle. * * * While Heath was not an empresario within the meaning of the third section, his petition and action of the Ayuntamiento thereon clearly constituted a contract."

The word "families" does not apply to a covenant, or to a contract in the nature of an empresario's contract, is the objection of the court. It is the settled rule in the construction of statutes that where the plural is used, unless expressly negatived, the plural includes the singular.

One family could present themselves and they might do this through the head of the family. Johnson *v.* Smith, 21 Tex. 722; Cessna's brief, p. 27, 28. The language of the third section is the *empresarios*, by whom it is understood those who introduce two hundred families, &c. Yet no one would say that *one* such was not enough—that it must be two or more empresarios. The language of this section is as explicit and within the express words of the statute as is the word "families" in the fourth section, and the head

of a family is sufficient, for it could not reasonably be expected that a foreigner desiring to emigrate to and settle in such a wilderness, inhabited by worse than the wild beast at Ephesus, would carry his wife and children with him, as he would his staff, pistols, or bowie knife. The courts have decided the other way in construing similar statutes. Puroyesa *v.* Schultz, 21 Cal. 513.

Without more than merely calling the court's attention to the meaning of the words "not included in a contract," we would merely suggest that the contract referred to—in which to be included would disqualify the emigrant from presenting himself as a colonist—clearly refers to the previous section, relating to contracts with empresarios, made with emigrants. The court, however, refers these words to the condition that a colonist finds himself in after he has presented himself to the Ayuntamiento.

The Court argues in a circle. The Ayuntamiento has power, it says, to assign a colonist, not included in a contract, lands within the town grant. If a colonist presents himself and asks and is given the land on condition that he shall settle in conformity with the industry which he promises to establish, the action of the Ayuntamiento in accepting his proposition and assigning him his lands clearly constitutes a contract, and, so soon as this is made, the colonist is "included in a contract," and the Ayuntamiento has, under the decree, no power to make the grant. The arguing goes round so swiftly in a circle that it makes dizzy the philosophy of logic.

The court then gives a *third* reason, not promised in the prologue of the opinion. It goes on to say: "El Paso, like other Spanish towns, *is presumed* to have had a grant of four square leagues of land, and the Ayuntamiento had the power to make allotments of land within the four leagues so granted." No such presumption exists. Hall on Mexican Law says, "Limits of Pueblos.—There never existed any general law fixing four square leagues as the extent of pueblos and towns." (Hall on Mexican Law, sec. 117, p. 151.) The Supreme Court of the United States settled this in the case of Santa Fé *v.* Rus, 195 U. S., 690, 691.

The record does not show how much lands the town had or that it possessed any.

Hence the court came to the conclusion upon this false predicate, that the power conferred upon the Ayuntamiento by the decree of 1823, with reference to emigrants, was simply to allot to them lands within the town grant. Read the preamble of the Act: "The government of the Mexican nation will protect the liberty, property, and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire."

Now, if no more was meant by this high-sounding pronunciamento than that the town council should have power to assign emigrants town lots, which under prior laws provided that they should be of a small and insignificant size, it sounds very much like a tempest in a teapot—an opera bouffe edict, issued by his illustrious highness and imperial majesty, the Emperor Iturbide. We have no fear that the grave and serious men who compose this tribunal will so construe this statute.

If Heath had not asked the land to be granted to himself, to be cultivated and operated by him for himself, there might have been some plausibility in the position suggested, that he was asking for a contract in the nature of an empresario contract embracing, however, less than two hundred families. The personal character of the business he was to undertake forbids us to so interpret it. The court then says: "Or if it should be said that the body had the power within the territory without the town grant, over which territory it had jurisdiction, we, the court, answer, that unless their power was enlarged by the decree, they could make allotments only in the quantities prescribed by existing law and regulations governing allotments within the town grants;" and the court goes on to say, "and we find nothing in the decree indicating an intention to confer such enlarged powers."

The appellants claim that the power was not enlarged; that it was not built upon any power then existing. It was a novel act of colonization, with a novel power bestowed upon the Ayuntamiento as the agent of the government, to distribute its lands under the 4th section of the Act.

As the pueblo lands, and the public lands outside of the pueblo lands, were entirely under the control of the general government, and the title stood in Iturbide to both classes of land, it might be contended with more plausibility, as the legislature could dispose of both lands, that article 4th, making no distinction, the Ayuntamiento might convey both to colonists; but we make no such contention. The general colonization laws were not dealing with pueblo lands, but with public lands, and we are surprised that the learned court below should have suggested such a claim for appellees as article 4 only referred to pueblo lands.

The court is cautious, however, to admit that the Ayuntamiento had no power to convey these lands unless the power of the Ayuntamiento was enlarged by the decree.

The title of the pueblo lands of El Paso, if any existed, was not in the town but in the government, and the license to use them by the

town is given to it by the government, and the government could resume the possession or could authorize the town council to sell them upon the terms prescribed in article 4 of the National Colonization Laws, and, *a fortiori*, the public lands within the jurisdiction of El Paso and outside the pueblo lands and in which it had no interest might by authority of the Mexican government to distribute and grant these lands, be granted to the Ayuntamiento, and we claim that section 4 means this or it means nothing. If it means nothing, then the colonist could not, short of going to the government at the City of Mexico, obtain a grant, which at that time would have subjected him to all the perils that St. Paul encountered and so vividly describes in his journey to Rome.

The colonization law did not refer to the pueblo lands, but to national colonization upon national vacant lands. The Act of 18th of August, 1824, following this purpose, expressly so provides.

The court says, "It seems incredible that the executive should have intended by the decree to confer upon subordinate officers lying in remote provinces the power to dispose of the public domain to foreigners in unlimited amount upon such terms as they might choose."

It must be remembered that if the Ayuntamiento was *remote* in this particular case, the lands they were to grant were also very remote and absolutely at that time worthless. The lair of a lion was not more dangerous to white men than was this wilderness.

It is also to be borne in mind that in passing upon the merits of the proposition as to how much land should be given to a colonist the Ayuntamiento were performing a judicial act, and, if so, it is no objection that the judicial officers reside remote from the capital but in proximity to the place where they are to perform their judicial duties.

Under the law of the Indies, a person offering to perform a less service than Heath offered for his lands, and in bringing in thirty families, four square leagues of territory, either in a square or lengthwise, according to the quality of the land, in such manner that when located and surveyed shall be a quadrangle, was assigned him.

Lib. IV, Law 6, White's Recop. 44.

No doubt this law, although repealed by the Act of 1823, had a great influence upon Heath (who prepared his petition before this repeal) in naming this number, and the Ayuntamiento in assigning him this land. At all events, there is no claim of bad faith on the part of either of the contracting parties.

One thing is sure, and should have attracted the attention of the court, that these lands and the Ayuntamiento were just as remote when regranting them to another as in the first instance, yet no one doubts the power to regrant.

The court concludes its opinion, that after the grant was made, and before Heath left the county to bring his family, Iturbide had been overthrown and the decree under which the privileges were extended to him had been revoked (although there is not a particle of evidence to support this, but the inference is strong, that Heath with knowledge of these facts would not have gone on a long and perilous journey to bring his property and settlement, involving a cost of a large fortune, to a place he was forbidden to occupy and own).

As to the proposition that a change of government worked an impairment of Heath's title, that will fall more conveniently in another place in this brief, so we will not discuss it for the present.

It was to this government, established under the plan of Iguala as an empire and not as a republic, that Heath, through the Ayuntamiento of El Paso, presented his petition for the assignment of the land in question. As to the quantity of land petitioned to be granted, and as to its value, the letter of the Ayuntamiento gives us a very clear idea. The letter is found in the printed record at page 144, fol. 226. The letter sets forth that the corporation, being as yet little informed of the existing orders in force in the matter of granting such land to foreigners aspiring to be citizens of the empire, and to establish themselves at the place of the Bracito, which was about twelve leagues distant from El Paso, there being no professional educated person in this place nor in the whole province with whom to consult, the Ayuntamiento recites to His Majesty the reasons it has for the benefit it seems to it may result from these inhabitants and settlers.

The letter then states that "this entire jurisdiction of El Paso has about 8,000 souls, governed politically and civilly by three common councils under the command of a Lieutenant-Governor, which government is vested provisionally in three alcaldes of this town, and in military matters it is governed by the commandant of the neighboring presidio of San Elceario; in ecclesiastical matters, by the curate of this town, etc., who governs the very near and almost contiguous towns, San Lorenzo, Senecu, Ysleta, Socarra, where the jurisdiction terminates. In all this territory we, the inhabitants thereof, desire the arts and industries demanded by the fertility of the soil be established, for up to date it can be said that we have

been in need of and are in need of everything, even being ignorant of the names of artisans, and without having masters to teach them to us, or at least to see them, in order to imitate them."

A more wretched state of helplessness and uncivilization than is shown by this extract seems improbable at this day. The nakedness of the land is here sharply and clearly disclosed.

The Ayuntamiento then declares "that when the new settlement to which the petition refers is established in the vicinity of this place, it will redound to the great benefit of these miserable, ignorant, and remote inhabitants. Therefore, as faithful subjects and with the confidence of loving sons who cry out in their necessities, and who send up to the higher hands of Your Majesty these documents which we judge necessary that Your Majesty may decree and determine what may be convenient, the parties in interest await in this town your imperial decision."

This letter is dated December 27th, 1822.

Appended to this letter are certificates of prominent public men certifying that Dr. Heath is a gentleman of high standing in the country of the United States and much esteemed for his abilities in the learned professions, and a man of firm integrity; a member of the Catholic Church, zealous, moral, and industrious; a late member of the convention for framing the constitution of the State of Missouri; a member of the House of Representatives of this State from the County of Franklin.

The domestic wants of the people of New Mexico in this locality, as well as the creation of an inexpensive militia to be used as a defense against cruel and warlike tribes of Indians, made it a public good to the whole surrounding country that such a man should become a settler among them; introducing over two hundred persons with him and bringing on the land printing presses, machinery, artisans, and skilled labor. This land was verily a wilderness, inhabited by a roaming savage tribe of Indians, and as a consequence of little or no value. It had, indeed, in its bosom the fertility which, in the care of civilization and under the statesmanship of the plow, might become a tract of great value. Like the diamond glittering at the mouth of the Ganges, valueless for delight or usefulness until the hand of commerce and enterprise plucks it from the depths, and takes it to the markets of trade, this land, for the first time, when intelligent labor and enterprise settles it, becomes a jewel of great price.

It was on this account and the deplorable condition of the country that the Emperor approved of a colonization Act that

would enable the Ayuntamiento to designate the lands to colonists that should present themselves to the Ayuntamiento of the place where they might wish to settle, in order that these colonists might settle the lands agreeably to the industry which they might desire to establish. There being no longer viceroys, the Emperor felt the same necessity for political agents to designate the lands, as induced the King to revoke his decree requiring titles to colonists to be presented to him. (Hall's Mexican Laws, § 27.) The reason given was the great distance and expense.

The Ayuntamiento of the place would be better judges of the colonists who would become their neighbors and a constituent part of themselves than the government, situated thousands of miles away, without any facility of communication or information as to the local wants of the place where the settlements were to take place. On the other hand, the empresario, acting simply as a public broker of lands, with no intention of settling upon any of them himself, but only pledging his efforts to bring such persons as would become colonists on the public lands, the Emperor, himself, reserved the power to distribute such lands to such public real-estate agents, without consulting the Ayuntamientos, if any existed in the neighborhood to be settled, concerning the contract which he may make with such empresarios.

Land situated as this, and as described by the Ayuntamiento, was but a type of millions of acres and thousands of square miles in this dark, savage, and bigoted country! The Ayuntamiento could then be safely trusted with the settlement of public domain for actual cultivation of so little value as was this land, and it was wisely bestowed upon them to choose the inhabitants, if the public good alone were to be served. It was with such information as this letter from the Ayuntamiento to the Emperor disclosed that he, as the imperial owner of the title of these lands *pro bono publico* with the *jus disponendi*, caused to be framed and approved by him the colonization law of January 4, 1823. Under this Act, by section 10, establishments made under a former government, which were then pending, were to be regulated by this law in all matters that may occur, but all those which are completed shall be governed by the law of the former grant. Heath's grant, the petition of which was pending, was to be good by this law, being a petition as a colonist and not as an empresario grant.

It was truthfully recited in the minutes of the Ayuntamiento, under the date of April 3, 1823, that the petition of Heath of December 27, 1822, that the government of this province, through Capt. Don Jose Antonio Viscarra, political and military chief, in an official communi-

cation of March the 2d, sent the decree of January 3d of this year, commanding it to be published and obeyed, and in answer to Heath's inquiry as to what had been done with his petition to the Emperor, communicated to the Emperor through the Ayuntamiento the Act of the 3d of January, 1823, and as such it was read to him. Under this law, then, Heath presented himself as a colonist to the Ayuntamiento to have the lands designated to him corresponding to his proposals to settle and cultivate. Section 4 of such Act was their guide, and the *expediente*, and the subsequent survey, were made under it, by their authority and in pursuance of this section of the Act.

On the inquiry, Had the Ayuntamiento power under the Act to make the grant of the land to Heath? it may be added that at the time the Act of January 4, 1823, was passed, if we take the declaration contained in the Ayuntamiento's letter of the 27th of December, 1822, as competent evidence tending to establish its status, we find that it was governed politically and civilly by a common council, and three alcaldes of the town, who held the powers of a Lt. Governor (Rec., fol. 277). These alcaldes were a constituent part of the Ayuntamiento.

In interpreting the Colonization Act, the usages and customs which acquired the force of law when established, define and interpret the legal meaning of the statute.

The Ayuntamiento forwarded to the acting governor of the province of New Mexico the *expediente* given to Heath, accompanied by an official letter dated April 26, 1823 (Rec. 155, fol. 240, Deft. Ex. 4). About two months afterwards, on the 17th of June, 1823, the acting governor presented the report to the departmental assembly. Between the 17th and 19th of June, the assembly resolved to express to the Ayuntamiento the surprise it felt at the violent and mistaken procedure in giving land to foreigners and also in violation of the law of January 3, 1823, thus opening the door to the continual complaints of the people. The deputation refrained from making any observation to the Ayuntamiento on account of the colonization law which was the moving cause in the concession of the Bracito land to Heath having been repealed. The Assembly then gives directions to the Ayuntamiento that in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families he offers to bring, it should notify said Heath *through the Plenipotentiary of the United States*, resident in New Mexico, or in some other manner which it might deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso,

was through a mistaken and wrong understanding in relation to the colonization law already repealed, but they do not say in what particular. It is safe to say that had the suspension been duly published they would not have been misinformed. This letter is signed not by the acting governor of the province, but by one F. J. Chaveze, who was, perhaps, the presiding officer of the assembly, and by one J. B. Vigil, who was deputy secretary. There is no evidence extant from the minutes of the records of the Ayuntamiento that any action was taken in pursuance of this letter of advice, or that Heath, either directly or through the Plenipotentiary of the United States, was notified of the contents of such letter, or that the Ayuntamiento had recalled the grant if it could legally do so.

This paper was offered in evidence by the petitioners and by the defendants, but, by the petitioners as a separate paper, constituting no part of the grant. (Rec. 37, fol. 72.)

If the Act of 1823 authorized the Ayuntamiento to make grants of land under section 4 of the colonization law of 1823, and further permitted it to make such grants subject to the superior determination of the government to which the expediente shall be given by the Ayuntamiento, then, in the latter case, the government is to determine whether such grant is to be approved or rejected. On the other hand, if the Ayuntamiento was instructed under the Act of 1823 to designate the lands and to grant them corresponding to the industries which the colonist seeks to establish, the selection and determination is a judicial act which must be exercised by the Ayuntamiento itself, and not be made subject to the determination of another, especially if that other be a political and not a judicial body. No one would contend that in the judgments and decrees of this court a clause in such decrees that the parties must have the benefit of the decree subject to the determination of any of the political departments of the government could be reviewed or set aside by such department. The judgment of this court could not be reviewed or corrected by any such order of this court, and so it was with the judicial powers conferred on the Ayuntamiento to determine, and, upon such determination, to grant. Certain it is that the Act did not confer in any way upon the departmental assembly the power to grant or to approve or annul grants of public land. It is not necessary to quote authorities in support of the doctrine that such powers cannot be delegated.

The letter of the Ayuntamiento (Appellees' Ex. 2, Rec. 153, fol. 238), transmitting petition and proceedings to the governor, conclusively shows that they did not understand that the governor or the departmental assembly were to approve or reject Heath's grant.

It was a letter asking for general advice.

It recites in brief that, in consequence of the resolution made this 3d of April, 1823, upon the petition of Juin Gad, an Anglo-American, I forward to Your Excellency a copy of the minutes and application, together with the subsequent proceedings up to the *full* execution of article 4 of the decree of January 3d of this year, but as the full execution of this law is *new* in these countries, it has occasioned two particular protests, &c.

It then recites that immediately after making Heath's grant, under the date of April 17th, there were presented two other petitions, and the municipal corporations regulating the distribution of land that may be useful and beneficial in promoting settlements, agriculture, arts, &c., place this corporation under the necessity of making known to your superiority the resolution, &c.

The letter says "that if the Ayuntamiento has erred in anything, the concession has been made subject to the superior determination. Besides, it has in mind the fact that the new settler came with a recommendation in his passport from the assembly of the United States, the government of which was the first that recognized our glorious independence, and has admitted in its court the ambassadors of the empire, recognizing them with every formality."

It then states "that this letter is written that the governor may, in view thereof, order what may be just and convenient to remove *uncertainty* and to proceed with certainty in every matter."

This letter demonstrates that the Ayuntamiento were ignorant of the ways and means of carrying out the articles of the colonization law, and wanted advice to remove this uncertainty as to their conduct in the future.

Whether what they had done under article 4 was right or not, they did not know; whether the governor or the departmental assembly should approve the grant they did not know; but if it did and was not good without it, they made it subject to their superiority. The governor did not think, or the assembly, that it required their official sanction. If they had so thought they would have said so in no uncertain tone, and not have said it was bad because the colonization law *was repealed*, which was not a fact. If the Act had been repealed and the Ayuntamiento had no power to make the grant, they would be liable to Heath for refusing him his right to occupy his lands. But if it was legal, then a refusal would subject them to damages. The assembly took this view and advised them to notify Heath before he brought his goods, that he could not have his lands, and by so doing mitigate the damages.

The assembly speak of poor judgment, but no word of a want of power. Nor do they claim that the Act was repealed at the date of the grant to Heath, but only at the date of writing the letter of June 19, 1823. It is true they claim that the Ayuntamiento were mistaken.

As the law is a matter of record and speaks now with the same tongue and meaning it spoke then, and as it was a statute of a new creation, this court is as able to say whether Heath got by his expediente a good and valid title, such as if he had not been driven from off his lands, his goods confiscated, and he banished from the country under penalty of imprisonment or death, he could have legally maintained, and as he has such a title, that he may ask that the decree of the court below be reversed.

Laches.

The government never assumes to hold adverse possession against her citizens and the legal holder of lands. All the Acts of Congress which have been passed to give parties the right to establish their claim assert this. While it will not prescribe any statute of limitation for itself it will not while it is in possession of the land or in granting it to another it is the *prochein amy* of the lawful owner. Hence, the Act of July 22, 1854, prohibits settlers on such grants as Heath's from claiming any adverse rights by virtue of their possession, either under a grant from the government, or as trespassers. This is not only so by force of this statute, but on general principles deducible from the treaties under which the government acquired the land.

This subject is so fully treated in Mr. Cessna's brief that nothing can be further added. See brief, pp. 119–122.

On the 17th of April, 1823, Heath was given judicial possession of his lands, and on the 25th of the same month the matter was concluded. Heath returned to the United States, returned to Mexico with his settlement, took possession of his lands, and was driven off, as we have seen.

If his right was perfect, and the Mexican government unlawfully prevented him from performing the conditions required by the 23d section of the Act, then prevention was performance, and the condition was satisfied.

City of Chicago *v.* C. W. I. R.R. Co., 105 Ill. 73–8.

Homer *v.* Ins. Co., 67 N. Y. 48.

Deal *v.* Ins. Co., 8 S. E. R. 34.

Ferris *v.* Coover, 10 Cal. 614.
U. S. *v.* Arrendondo, 6 Pet. 691.
Jacksonville M. P. R. Nav. Co. *v.* Hooper, 160 U. S. 516.

The repeal of the Act of 1823 by the passage of the Act of 18th August, 1824, also discharged the condition if it had been operative. Mr. Cessna's brief, pp. 95–99.

That the equities are all with the petitioners no one will deny, and we trust, this being so, we have demonstrated that the legal right is theirs also, and that although justice has been long delayed on account that Heath, in his lifetime, and his heirs up to the passage of the Act creating the Court of Private Land Claims not asserting in some litigation their rights, it must be remembered that he or they had no legal means through our courts to demand as a right that his or their property should be restored. We respectfully ask that the decree below may be reversed, and such order made as the case may require.

Respectfully submitted.

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